UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD REGION 22

COUNCIL OF CHAPTERS OF AAUP at UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY,¹

Employer

and

CASE 22-RC-13014

TEAMSTERS UNION LOCAL NO. 115 INTERNATIONAL BROTHERHOOD OF TEAMSTERS²

Petitioner

DECISION AND DIRECTION OF ELECTION

The Petitioner seeks to represent a unit of three employees employed by the Council of Chapters of AAUP at University of Medicine and Dentistry (the "Employer" or "AAUP") at its Newark and Piscataway, New Jersey facilities. The Employer contends that the petition should be dismissed because the Union seeks to represent only confidential employees or alternatively, if only one employee is found to be confidential, to exclude that employee from the bargaining unit. The Employer has raised no other issues.

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

- 1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- 2. The Employer is engaged in commerce within the meaning of the Act and will effectuate the purposes of the Act to assert jurisdiction herein.³
- 3. The labor organization involved claims to represent certain employees of the Employer.⁴
- 4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.⁵
- 5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:⁶

³ The Employer, a New Jersey non profit organization, with offices located in Newark and Piscataway, New Jersey, the only facilities involved herein, is engaged in public sector labor relations.

⁴ The parties stipulated and, I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

⁵ The parties stipulated that there is no collective bargaining agreement that could bar an election in this matter.

All full-time and regular part-time administrative assistants, senior staff representatives, and labor relations representatives who work at the Employer's 30 Bergen Street, ADMC 1416, Newark, New Jersey and the 675 Hoes Lane, West Piscataway, New Jersey facilities excluding office clerical employees, guards and supervisors as defined in the Act.

The only issue for consideration is whether one or more of the employees in the petitioned for unit (the "Unit") are confidential employees.

I. FACTS

A. Background

The AAUP is a labor organization that represents a bargaining unit of over 1,500 faculty and librarians (the "Faculty") employed by the University of Medicine & Dentistry of New Jersey (the "University") at its component schools and campuses in Newark, Piscataway, New Brunswick and Stratford, New Jersey. The AAUP and the University are parties to a collective bargaining agreement effective July 1, 2004 to June 30, 2009.

The AAUP is governed by a state-wide Council with authority over bargaining matters that pertain to Unit employees in the entire University, while two local Chapters maintain separate geographic jurisdiction. Each Chapter is governed by a sixteen person committee. One Chapter has jurisdiction over Newark and the governing committee is referred to as the Board of Governors. The other Chapter has jurisdiction over Piscataway, New Brunswick and Stratford and the governing committee is referred to as the Executive Committee. The Board of Governors and

⁶ The unit description is in accord with a stipulation of the parties that I find to be appropriate for purposes of collective bargaining.

the Executive Committee elect members to The Council. The Council, the Board of Governors and the Executive Committee have separate bylaws, officers (i.e., President, Vice President and Treasurer) and bi-monthly meetings.

The Employer employs a staff consisting of the following four individuals: Executive Director Alex Bernstein, Senior Staff Representative Amy Reeder, Labor Relations Representative Robert Witkowski and Administrative Assistant Vatrice George (the "Staff"). The Petitioner seeks to include Reeder, Witkowski and George in the Unit, while the Employer seeks to exclude them all as confidential employees. The parties agree that Bernstein is a managerial employee who must be excluded from the bargaining unit.

Bernstein and George work in the Employer's Newark facility while Reeder and Witkowski work in the Employer's Piscataway facility.

To the extent possible, historically, the Employer has attempted to apply its contracts with the University to the Staff. Thus, the Staff and Faculty enjoy the same 401(k) plan, health insurance and other benefits. Staff members also receive the same percentage wage increases as Faculty members. However, Staff members do not have the same salaries as Faculty, grievance and arbitration procedure, and other contractual rights and benefits that are not feasible to apply.

The entire Staff attends all AAUP meetings of The Council and the Chapters, take calls from bargaining unit employees and participate in other contractual matters. For example, Witkoswki testified that he is involved in the handling of grievances and

Reeder testified that she and Witkowski are preparing certain proposals for upcoming AAUP negotiations with the University.

B. Alex Bernstein

Bernstein leads the Staff in working with The Council and the Chapters on matters of negotiation and administration of contracts between AAUP and the University. In addition to his activities on behalf of AAUP vis-à-vis the University, Bernstein is responsible for management of the Staff and day-to-day AAUP operations. Thus, Bernstein supervises and works with each member of the Staff in their respective capacities and job functions. He works with Reeder on budgetary matters, Witkowski on membership recruitment and George on tracking membership. Bernstein also prepares evaluations for each Staff member and recommends personnel action regarding them to The Council, such as hiring, promotion and the amount of their merit pay increases.

C. Amy Reeder

Reeder is the person primarily responsible for the Employer's finances. She manages staff payroll and benefits, including contributions to the 401(k) account, health insurance, flexible spending accounts for uninsured medical costs and other benefit plans. She also pays the Employer's bills and maintains the checkbook, tax returns, payroll records and other financial documents.

Reeder also prepares and maintains the Employer's budget. Thus, Reeder prepares a preliminary budget each year in consultation with the Budget committee (i.e., Bernstein and the treasurers of each Chapter) for submission to and approval by

The Council. Most of her budgetary calculations are based on fixed revenues (dues and fees) and expenses (e.g., salary and scheduled pay increases), but some factors are discretionary and speculative (e.g., money to be allocated for merit pay increases and an adjustment for inflation). To the extent that budget calculations are discretionary, the Budget committee determines the numerical formula and Reeder applies it.

Although Reeder incorporates an amount of money to be designated for merit pay increases in her budgetary calculation of payroll, the record did not establish that Reeder is aware the amount allocated to each Staff member on an individual basis. Bernstein includes in each employee's evaluation a recommendation to the Council for his/her merit pay increases, and Reeder testified that she does not have access to her colleagues' evaluations.

Reeder was involved in the hiring of George and Witkowski.⁷ Reeder and Bernstein interviewed George for her position and Reeder made a recommendation to Bernstein regarding an appropriate starting salary for her. Reeder and Bernstein also drafted a job description and advertisement that they posted in various places for Witkowski's position.

D. Robert Witkowski

Witkowski is responsible for educating bargaining unit employees about AAUP and expanding the membership. Thus, Witkowski visits campuses, fields calls from employees, distributes information about AAUP and solicits new members. As

⁷ The Employer has asserted that Reeder is not a supervisor under Section 2(11) of the Act.

mentioned above, he is also involved in grievance handling and contract administration.

E. Vatrice George

George works across the hall from Bernstein in the Newark facility and assists him with the day-to-day administration of AAUP. George types, proofs and files documents for Bernstein, opens the office mail and answers the office phone. She arranges AAUP meetings, distributes packets of materials for use in those meetings, takes the meeting minutes and transcribes them. In addition to assisting Bernstein, George works with and is being trained by Reeder in matters of the budget, payroll, accounts payable and finance. George is also the person primarily responsible for tracking Union membership and, like Witkowski, acts as a liaison with Union members to educate them regarding AAUP and its function.

F. Confidentiality of Documents, AAUP Meetings and Information

The entire staff has access to almost all the documents in the AAUP offices, which are not kept confidential between and among them. Therefore, the entire staff has access to the budget, tax records, the checkbook and other documents related to the financial and administrative operation of the Employer. The Staff also has access to minutes of AAUP meetings and documents related to the collective bargaining relationship between AAUP and the University.

The Staff does not have access to personnel files and evaluations. Personnel records are filed separately from other documents, they are not normally typed or handled by George, and staff members do not have access to those records (other than

their own).⁸ With respect to salary increases for Reeder, Witkowski and George, the record reveals that Bernstein submits a recommendation directly to The Council for their approval.⁹

The entire staff also attends meetings of The Council and the Chapters, which includes discussions of the budget and finances of AAUP. However, members of the staff have been asked to leave those meetings during discussions of personnel matters pertaining to them or their coworkers. Thus, when Bernstein presented a request by Reeder for maternity leave to The Council, Reeder and George were asked to leave. Bernstein testified that he "wanted to present it objectively" to the Council. In 2001, when Employer contributions to the staff's retirement plan were reduced from 9% to 8%, Reeder and then Executive Director Joyce Arnston were asked to leave. Meeting minutes of such personnel discussions do not contain details beyond a notation that the discussion occurred and the decision that was reached.

II. <u>ANALYSIS</u>

In these circumstances, I find that Reeder, Witkoswki and George are not confidential employees as alleged by the Employer.

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⁸ George ultimately saw a copy of the performance appraisals of Reeder and Witkowski when she was asked to send a copy of them to AAUP's counsel after the petition was filed. George was also asked to set up a call between Bernstein and the Employer's counsel. George was not on and did not make notes of the call. Bernstein later advised George of the Union's position regarding the petition and her alleged status as a confidential employee.

⁹ Although the record is silent, it appears that any document relating to an evaluation or recommendation of the Staff employees is prepared directly by Bernstein.

¹⁰ Bernstein testified that, since he was hired in February 2007, personnel issues related to the staff have only been discussed at 2 or 3 meetings of The Council. Reeder testified that she has been asked to leave meetings for discussions related to such staff issues of one kind or another during the 20 years that she has been employed by AAUP.

The Board excludes from a bargaining unit employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies with regard to labor relations. Ladish Co., 178 NLRB 90 (1969); Chrysler Corp., 173 NLRB 1046 (1969). The confidential nature of the employee's work must relate directly to the Employer's labor relations with the bargaining unit. Thus, an employee who has access to confidential business information will not be excluded from the unit as a confidential employee. See Fairfax Family Fund, 195 NLRB 306, 307 (1972); Swift & Co., 129 NLRB 1391 (1961). Further, an employee's access to personnel records is insufficient to consider her a confidential employee and exclude her from the Unit. See e.g., RCA Communications, 154 NLRB 34, 37 (1965). Conversely, the Board has found secretaries to be confidential employees where they assist in the preparation of and had access to confidential labor relations information pertaining to the employer's strategy and approach in bargaining with the union. Firestone Synthetic latex Co., 201 NLRB 347 (1973); Grocers Supply Co., 160 NLRB 485 (1966).

The Board will "adhere strictly" to its definition of confidential employees so as not to needlessly preclude employees from collective bargaining. *B.F. Goodrich Co.*, 115 NLRB 722, 724 (1956).

Here, it appears clear that the three employees at issue are not confidential employees. In that regard, Reeder, Witkowski and George do not act in a "confidential capacity" with Bernstein or the governing bodies of the AAUP. The Employer does not keep budgetary, financial and other records confidential from the

staff, even though access to that information might assist the employees in negotiations with the Employer regarding their terms and conditions of employment. That the Employer may now be compelled to bargain collectively with employees rather than on an individual basis does not make information confidential or the employees who possess it confidential. The Petitioner and the Unit employees will not have an unfair bargaining advantage by virtue of the presence of a purported confidential employee in the Unit because all of Unit employees will continue to have access to the same information that they had in the past.

In this regard, the Employer's reliance on the timing of Reeder's early access to certain financial information in preparing the budget and on *Hendrick's County Rural Elec. Membership Corp.*, 454 U.S. 170 (1981) is not applicable. The financial information to which she has access is not kept confidential from members of the proposed Unit, and the timing of Reeder's access to non-confidential information is irrelevant to the instant analysis. Further, preliminary budget figures regarding anticipated and discretionary labor costs of the Staff are determined by the Budget Committee, not Reeder. The evidence failed to establish that it would be impossible or even difficult for Reeder to be excluded from the mechanical calculation of those figures in the final budget if the Employer so desired. Finally, Reeder's access to preliminary anticipated payroll costs is not the same as access to the Employer's actual bargaining strategy and budgetary parameters regarding Unit compensation.

Unlike financial information, the Employer has denied access by the staff to information and meetings regarding personnel issues pertaining to them, believing

that such access might compromise the effective formulation and administration of labor relations policy. Thus, the Employer excluded staff members from meetings regarding their terms of employment in order to insure an honest and objective assessment of such matters. Likewise, staff members do not have access to the personnel files and evaluations of fellow Unit members. The evidence failed to establish that Reeder, Witkowski and/or George would necessarily have access to confidential information that would cause a conflict of interest and provide the Petitioner with an unfair bargaining advantage.

Clearly, the Staff does have access to and even helps formulate proposals and strategies for AAUP in its bargaining relationship with the University. However, that bargaining relationship is not at issue. Nor is it relevant that the Employer maintains a practice of providing staff members with the same benefits and wage increase that are received by the Faculty. Although the Petitioner might be able to glean certain helpful information based upon AAUP's positions with the University, as discussed above, staff members will not have access to confidential information – such as proposals and bargaining strategy – related to prospective negotiations between the Employer and the Petitioner. Further, as the Employer's attorney observed in his brief, there is no guarantee that AAUP will continue to maintain the same stance it took with regarding to Unit compensation and no guarantee that the Petitioner will request that this past practice be observed.

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¹¹ The Employer contends that has been a rare occurrence as personnel issues related to the staff are rarely raised at meetings.

The Board is reluctant to exclude individuals from the benefits of collective bargaining, and given its directive to "adhere strictly" to a limited definition of confidential employees, I find that there is an insufficient basis to conclude Reeder, Witkoswki and George are confidential employees, and I shall not exclude any of them from the Unit or dismiss the petition. Rather, the parties have stipulated and I find that the petitioned-for unit is appropriate, and I shall direct an election therein.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently

replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **International Union Local No. 115, International Brotherhood of Teamsters.**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the NLRB Region 22, 20 Washington Place, 5th Floor, Newark, New Jersey 07102, on or before June 30, 2009. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington,

DC 20570-0001. This request must be received by the Board in Washington by July 7, 2009.

Signed at Newark, New Jersey this 23rd day of June 2009.

/s/ J. Michael Lightner
J. Michael Lightner,
Regional Director
National Labor Relations Board
Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102